93-22

Supreme Court, U.S.
FILED
JUN 28 1993

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

REGINA CHAMBERS,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the 100 to 1 Ratio increasing the punishment for crack cocaine v. powdered cocaine violations is racially discriminatory. The cocaine base offenders are almost always black which Petitioner submits creates a suspect classification warranting a strict scrutiny analysis.

THE PARTIES

The caption in this case contains the name of all parties.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REFERENCE TO OPINIONS DELIVERED BELOW

1. The United States Court of Appeals for the Eleventh Circuit issued a three-page unpublished written opinion affirming the Petitioner's conviction and sentence on January 21, 1993, attached as Appendix "A".

2. The United States Court of Appeals for the Eleventh Circuit issued an order denying rehearing and rehearing en banc on

March 29, 1993, attached as Appendix "B".

JURISDICTION

On January 21, 1993, the United States Court of Appeals for the Eleventh Circuit affirmed the convictions and sentences of Petitioner Chambers upholding the prior rulings of the United States District Court for the Middle District of Alabama. On March 29, 1993, the United States Court of Appeals denied Petitioner's Suggestion for Rehearing\Rehearing En Banc. This Petition is filed within 90 days of said date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 13, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except

in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

TITLE 21 U.S.C. 841 (a)(1), SET OUT AT APPENDIX C

UNITED STATES GUIDELINES MANUAL SECTION 2D1 (a)(3) SET OUT AT APPENDIX D

STATEMENT OF THE CASE

Regina Chambers was charged in a one-count indictment with knowingly and intentionally possessing with intent to distribute approximately 987.7 grams of cocaine base, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1). She was arraigned on October 31, 1991, and entered a plea of not guilty.

A jury was selected on December 2, 1991, and the trial began on December 10, 1991. The trial concluded on December 12, 1991, after the jury returned a verdict of guilty as charged in the indictment.

Petitioner filed a motion for new trial on December 19, 1991 (R1-57-1), which was denied on February 5, 1992. (R1-63-1).

The Judge at sentencing denied (R7-20) Petitioner's challenges (R7-16,17,18,19) to

the constitutionality of the guidelines as relates to crack cocaine offenses, causing the base offense level to remain at 36. He agreed that a 3B1.2 downward role adjustment was appropriate, although he only awarded a two-level decrease for a minor role. (R7-39). This caused the aggregate base level to be 34. The Court granted Petitioner's request, in part, for a downward departure based on the presence of an isolated instance of aberrant behavior and reduced the aggregate offense level by one resulting in 33. (R7-59). The guidelines were then 135 to 168 months. (R7-60).

Petitioner was sentenced on February 18, 1992, (R1-71) to a prison term of 144 months, five years supervised release, no fine, and a $50 special assessment. (R7-60).

On February 27, 1992, Petitioner filed a timely notice of appeal. (R1-72).

On January 21, 1993, the Eleventh Circuit Court of Appeals denied Petitioner's appeal in a three-page non-published per curiam opinion.

On March 29, 1993, Petitioner's Suggestion for Rehearing and Rehearing En Banc was denied by the panel at the Eleventh Circuit.

Petitioner is presently incarcerated at the Federal Correctional Institution in Lexington, Kentucky.

ARGUMENT

The initial reaction of this Court may be to foreclose the possibility of review for the same reasons used by the Eleventh Circuit, precedent and inadequate record. Both of these factors will be more fully addressed in this petition. However, this Court is reminded that sometimes there are situations that require change despite the fact that legal precedent dictates otherwise. There are

some injustices so grave as to cry out for the collective rescue of this Court even though the tide goes the other way. This Court is reminded of the principles enunciated in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), when considering abandonment of what may be perceived as legal precedent regarding the challenge to the 100 to 1 crack to cocaine ratio in the instant case.

This Court in Brown v. Board of Education, supra, stated:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies 'and by a facility for adjusting and reconciling public and private needs.' These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest

> may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

Id. at 300. This Court in Brown v. Board of Education, supra, found that there had been inherent discrimination in public education. It, therefore, prescribed a remedy to relieve the discriminatory practice for the public as well as the private good.

In the instant case, Congress, in enacting the statutory punishment for cocaine base offenses, and the Sentencing Commission, in devising the Sentencing Guidelines, have established a statute and procedural guideline that are inherently discriminatory in relation

to the black populace of this country. Although case law of the past has indicated that there is no discrimination when viewed under the rational basis standard when applying the statute and the Sentencing Guidelines, it is urged that the Court review the process and rectify the wrongs that the courts are currently practicing when penalizing offenders for crack cocaine violations.

Congress enacted disproportionately harsher penalties for cocaine base offenses for the public good much like the segregation addressed in Brown v. Board of Education, supra, was practiced for the public good. The discriminatory impact of segregation was finally remedied in Brown v. Board of Education, supra, despite legal precedent to the contrary. Here, like in Brown, the discriminatory impact of enhanced punishment

for cocaine base (crack) offenses must also be remedied.

The Eleventh Circuit, in affirming Petitioner's sentence in its January 21, 1993 opinion, noted that Petitioner's argument failed for two reasons: (1) the court had previously upheld the enhanced punishment under a rational basis test citing United States v. Kins, 972 F.2d 1259, 1260 (11th Cir. 1992); and (2) that Petitioner's strict scrutiny analysis based on crack violators constituting a suspect classification (black) fails because there is absolutely nothing in the record to support the argument.

It is for these very reasons that review by this Court is essential. There is no criminal defendant convicted of a crack cocaine violation in a federal court in the United States that will be able to overcome the rational basis analysis nor is there any

crack violator that will be able to create an adequate record in a district court that will overcome this burden. The reasons for this are simple.

First, almost every circuit was faced initially with the rational basis challenge which repeatedly failed because of the dangerousness and addictiveness of cocaine base that has been argued in defense of the enhanced penalties. These positions have created a mountain of obstacles throughout the circuit courts making it virtually impossible to penetrate the precedent.

Secondly, the more appropriate challenge which has now been raised by Petitioner that the enhanced penalties for crack violations is unconstitutional because crack violators are black creating a suspect classification mandating a strict scrutiny analysis (which is believed would overcome the disproportionate

enhancement) has not been tested throughout the circuits. Petitioner's attempt in the Eleventh Circuit met with inevitable doom because of an inadequate record. At the heart of Petitioner's strict scrutiny challenge is purposeful discrimination at the very inception of the enhanced statutory penalties and sentencing guidelines. Therefore, exploration of the minds of the House of Representatives and the Senate at the time of enactment is insurmountable. As a result, this form of racial genocide[1] (occurring in the cases of blacks at every social level and age convicted of crack violations) will never end. The buck passing of the federal judiciary at both the district and circuit court level resulting from the existence of

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[1]The 100 to 1 ratio of enhanced punishment for crack cocaine violations is causing the incarceration of many blacks for most, if not all, of their productive lives.

these artificial barriers noted above will never afford any criminal defendant the required judicial review to ferret out the real basis for the discrimination.

The genesis of the enhanced penalties for crack cocaine violations spawned from early feedback of law enforcement officers faced with the phenomenon in urban ghetto areas which was reported in a June, 1986, Newsweek article, is addressed as follows:

> "Crack has captured the ghetto and is now inching its way into the suburbs; its users come from all social strata and all walks of life....
>
> The police are losing the war against crack and the war is turning the ghettos of major cities into something like a domestic Vietnam. The analogy is shopworn but apt. The crack trade operates like a gorilla insurgency and makes an infuriatingly elusive target for police. Dealers - "ounce men" as they are known in L.A. - organize small cells of pushers, couriers and lookouts from the ghetto's legion of unemployed teenagers. They enforce discipline with savage violence,

change locations frequently and alter their tactics constantly to fool narcotics agents. Police raids on "crack houses" typically recover too little cocaine to impress prosecutors or the courts: given the logjam in the prisons, most offenders spend little or no time in jail. Undercover investigations aimed at ringleaders often lead nowhere; crack can be manufactured in any kitchen, and the trade in bulk cocaine is highly decentralized....

It could be anywhere. The drug is the same, the hustle is the same and the cops all say the same thing, selling crack is where the money is. Where the action is and where the ghettos inverted social pecking order begins. "Rock" cocaine has taken on the social esteem that being a pimp had 20 years ago....Its just the in thing to do like wearing fila running shoes. And these people are very, very into the in thing. The ounce men drive BMW's and Mercedes. The kids who work as runners and lookouts wear $200 designer-labeled running suits. By the weary estimate of one of Wilkinson's colleagues on the L.A.P.D., Detective Charles Johns, the rock business is now the largest employer in the Los Angeles ghetto....

Since 1980, according to Congressional sources, the influx of

> smuggled cocaine has risen from approximately 25 tons a year to 125 tons a year."

"Crack and Crime," Newsweek, June 16, 1986, pp. 15-19.

Interestingly, this June 16, 1986, Newsweek article, which primarily used as its source law enforcement officers in 17 major cities, was the genesis used by certain Senators to push forward the bill that amended the Controlled Substances Act and the Controlled Import and Export Act by increasing penalties particularly as related to cocaine base. Both Senator D'Amato of New York and Senator Mattingly of Georgia, in the Congressional Record, Volume 132, Number 85, of the 99th Congress, Second Session, mention and quote from the above-referenced Newsweek article as a source of much of their information regarding the "crack" epidemic in the United States. This "epidemic" and the concern that followed apparently justified the

enhanced penalties was first introduced under The Crack and Cocaine Meaningful Penalties Act which was not passed by Congress during the 99th Congressional Session. However, strikingly similar provisions were enacted by Congress with the enactment of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, §§ 1001-1009, 100 Stat. 3207. 3207-2 to 8 (1986).

The reasons articulated by Senators D'Amato and Mattingly for the enhanced penalties other than those stated in the Newsweek article were the potency of crack, the fact that drug dealers need carry much smaller quantities of crack than cocaine powder, the addictive nature of crack, the popularity of crack, and its affordability, as reasons for the enhanced punishment. However, in reading between the lines it is apparent that the real threat as noted by the law enforcement officers who were quoted in the

Newsweek article which was relied on by the Senators to support the inclusion of provisions of The Crack and Cocaine Meaningful Penalties Act in the Anti-Drug Abuse Act of 1986, was the fear that ghetto dwellers, high on crack cocaine, would infiltrate the predominantly white suburbs creating havoc and mayhem, robbing, pillaging and raping, as a result of and in order to, satisfy their craving for a 5 to 20-minute high obtained through inhaling the vapor from powdered cocaine which had been cooked into a solid substance referred to on the ghetto streets as rock or crack.

The reference to the "ghetto" in the above Newsweek excerpt four times is a clear indicator that the crack problem is a minority problem (at least the sales are minority related). After all, the Oxford American Dictionary, New York, Oxford University Press,

1980, defines ghetto as follows: "2. a part of a city or region in which members of a minority group live as a result of social or economic discrimination." Clearly the references to ghetto and crack is synonymous to black and crack.

Following the lead of its creator, Congress, the Sentencing Commission, in November, 1987, set forth in the Sentencing Manual, Section 2D1.1(a)(3), that one gram of cocaine base was the same for punishment purposes as 100 grams of cocaine powder.

It should also be noted, however, that the Sentencing Commission, unlike Congress who relied on journalists relying on law enforcement officers in major cities as its source of information regarding the dangers of crack cocaine, had available to it some

100,000 case studies[2] which provided a thorough and inclusive data base indicating that a disproportionate number of blacks were involved in the sale and distribution of cocaine base as opposed to whites who were generally involved with powdered cocaine.

Based on accumulated data, both Congress and the United States Sentencing Commission

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[2]The Sentencing Commission analyzed considerable data drawn from more than 10,000 presentence investigation reports and less detailed data on nearly 100,000 federal convictions during a two-year period. Furthermore, the Administrative Office of U.S. Courts provided a computer file of all defendant records in its federal probation sentencing supervision information system (FPSSIS). This provided access to data regarding all felony and serious misdemeanor cases leading to convictions since mid-1983. Included in the data was a description of the offense, a characterization of the defendant's background and criminal record, the method of disposition of the case, and the sentence imposed. In addition, the presentence reports that were investigated all referenced the offender's race.

Judge William W. Wilkins, Jr., in an article "The Guideline Development Processing Pending Legislation," stated "In developing its guidelines, the Commission analyzed in detail more than 10,500 actual cases (and another 40,000 in lesser detail) to determine the factors that judges deem relevant in the sentencing decision. These factors formed the basis for the drafting of the guidelines; and, when a commission changed current practices, it did so deliberately."

knew full well prior to the implementation of the Anti-Drug Abuse Act of 1986, which included the rationale of Senators Mattingly and D'Amato, when supporting The Crack and Cocaine Meaningful Penalties Act and creation of the sentencing table, which is used to establish guideline ranges pursuant to the United States Sentencing Guidelines Manual, Section 2D1.1(a)(3), that "crack meant black" and that creation of the 100 to 1 punishment ratios of crack versus powder would cause discriminatory punishment for members of the suspect class (the black race).

It is abundantly clear that, at least, the United States Sentencing Commission had before it statistical information that revealed that black defendants were disproportionately involved in crack cocaine

offenses.[3]

Numerous challenges have been levied in most of the circuit courts regarding the unconstitutionality of the 100 to 1 ratio of cocaine to cocaine base in the sentencing guidelines as well as the constitutionality of the mandatory/minimum prison sentence for violations of Title 21 U.S.C. Section 841(a)(1), (b)(1)(B)(ii), (iii). United States

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[3] 'A more disturbing finding is that mandatory sentences hit minorities especially hard. In one group of cases studied, 67.7 percent of blacks received the minimum or more, compared to 57.1 percent of Hispanics and 54 percent of whites.

"The difference found across race appears to have increased since 1984," the report notes. "This difference develops between 1986 and 1988, after implementation of mandatory minimum drug provisions, and remains constant thereafter."

The inequity may be even worse because of the federal guidelines, according to another study to appear in *American Criminal Law Review*. It concludes that, since the guidelines took effect, sentences for young black men are "significantly higher" than for young white men.

In 1989, for example, black males age 18 to 35 spent an average of 83.4 months in jail for drug crimes under the guidelines while their white counterparts were jailed 53.7 months.' American Bar Association Journal, December 1991, pgs 36-37.

v. Solomon, 848 F.2d 156 (11th Cir. 1988); United States v. Buckner, 894 F.2d 975 (8th Cir. 1990); United States v. Crew, 916 F.2d 980 (5th Cir. 1990); United States v. Cyrus, 890 F.2d 1245 (D.C. Cir. 1989); United States v. Kinsey, 843 F.2d 383 (9th Cir. 1988); United States v. Thomas, 900 F.2d 37 (4th Cir. 1990).

Without exception the circuit courts have held that the 100 to 1 ratio withstands a substantive due process attack and that the ratio set forth in the guidelines is rationally related to Congress' objective of protecting the public welfare.

Most of these challenges have taken a different approach than the one now being taken by Petitioner Chambers. Specifically, they have dealt with the addictiveness of crack versus powder cocaine, the rational basis analysis and Eighth Amendment

challenges.

Petitioner Chambers, like most other criminal defendants, simply did not nor does she have the financial ability to tackle such an awesome task as interviewing each member of the House of Representatives and the Senate. No district court in this country has the time to allow criminal defendants an opportunity so subpoena and question these individuals as to their mind set when voting to pass the legislation. This exercise, however, appears to be the only way any reviewing court will be satisfied with a records ripeness for review.

The fact that Petitioner and other criminal defendants do not have the resources to undertake this exhaustive inquiry should not deny them equal protection under the law.

In addition, the Supreme Court of the State of Minnesota in State v. Russell, 477

N.W.2d 886 (1991)[4], struck down the state's crack cocaine statute (which was virtually identical to the federal statute) as violative of the equal protection clause of the Fourteenth Amendment. As pointed out by the Supreme Court of Minnesota, powdered cocaine may be liquified and injected just as powdered cocaine may be cooked and formed into crack for smoking. Both are done to expedite the effect.

It is ludicrous to penalize the small nickel and dime street pushers more for selling less expensive and smaller quantities of cocaine base (which can be cooked in anyone's kitchen by anyone purchasing powdered cocaine if they are desirous of escalating the effect) than those more sophisticated and

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[4]Furthermore, the racially disproportionate punishment was addressed in State of Minnesota v. Russell, supra, although the holding was based on a different reason.

financially solvent importers and distributors of larger quantities of cocaine powder. However, this is exactly what is occurring. Petitioner Chambers argues that a rational basis test is insufficient as crack dealers are black and, therefore, creating a suspect class which mandates a strict scrutiny review.

A Congressional statute accords with substantive due process only if it bears a "reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory." Nebbia v. New York, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934).

While the statute and the guidelines on their face may not show any purposeful discrimination or intent, reading between the lines clearly reveals that there was, in fact, discriminatory and purposeful intent.

A racial classification, regardless of

purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Such is the case at bar. The statutory provision penalizing cocaine base offenses and the applicable sentencing guidelines, on their face, are not racially classified. However, they are ostensibly neutral but create racial discrimination.

Even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the equal protection clause only if that impact can be traced to a discriminatory

purpose. Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 97 S.Ct. 55, 50 L.Ed.2d 450 (1977). As this Court held in Personnel Adm'r of Massachusetts v. Feeney, 99 S.Ct. 2282 (1979), discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not. Petitioner Chambers submits that discriminatory intent was a factor that influenced the legislative choice with regard to the statutory penalty enhancements pertaining to cocaine base offenses and a conscious choice for the Sentencing Commission when establishing the guidelines.

However, a discriminatory purpose implies more than intent as volition or intent as awareness of consequences. See Feeney, supra,

citing United Jewish Organizations v. Carrey, 430 U.S. 44, 179, 97 S.Ct. 996, 1016, 51 L.Ed.2d 229 (1977) (concurring opinion). "Discriminatory purpose" implies that the decision-maker selected or reaffirmed a particular course of action at least in part "because of" not merely "in spite of," its adverse effects upon an identifiable group" (Feeney, supra, at 278).

To survive a challenge under the equal protection clause, statutes reflecting race based discrimination must be substantially related to the achievement of important governmental objectives.

Race is an inherently suspicious classification. Schweiker, Secretary of Health and Human Services v. Wilson, et.al., 450 U.S. at 221 (1980). A strict scrutiny standard is necessitated when a suspect classification or fundamental right is

involved. Under the strict scrutiny standard a law will be upheld only if it is necessary to achieve a compelling or overriding governmental purpose. Most governmental action under this test fails.

CONCLUSION

This case presents for this Court an opportunity to use its supervisory power to ensure that disparate treatment between criminal defendants not result due to racial discrimination. Petitioner is requesting that certiorari be granted in the instant case because the issue raised herein is of such importance that failure to grant certiorari will serve only to perpetuate the existence of disparity between criminal defendants depending on race.

This case has far-reaching implications for the future of black criminal defendants convicted of cocaine base violations, and it

is respectfully suggested that this Court grant certiorari.

Dated this 28TH day of June, 1993.

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FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 21 1993
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-6156
Non-Argument Calendar

D.C. Docket No. CR-91-00262-N

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REGINA CHAMBERS,

Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Alabama

(January 21, 1993)

Before FAY, KRAVITCH and ANDERSON, Circuit Judges.

PER CURIAM:

Appellant, a black female, was convicted on charges arising from the transportation of "crack cocaine." On appeal she raises five issues:

1. Equal protection challenge to 100:1 ratio of crack to cocaine powder in determining base offense level

2. Denial of downward departure

3. Base offense level adjustment for minor role

4. Sufficiency of the evidence

5. Failure to give requested jury instruction

We have upheld those portions of the Sentencing Guidelines which equate 50 grams of "crack cocaine" with 5,000 grams of ordinary cocaine under the rational basis test. United States v. Kins, 972 F.2d 1259, 1260 (11th Cir. 1992). Appellant does make the additional arguments that Congress and the Sentencing

Commission acted with discriminatory purpose in establishing this enhancement for crack and that it should receive a heightened review. There is simply nothing in this record to support these arguments and they are rejected.

Appellant contends that the district court erred when it refused to make a downward departure on the basis of the weakness of the government's case. A sentencing judge's refusal to make such a downward departure is not appealable. United States v. Fossett, 881 F.2d 976, 979 (11th Cir. 1989). In addition, the weakness of the government's case is not a factor in arriving at an appropriate sentence. United States v. Brooks, 966 F.2d 1500, 1505 (D.C. Cir. 1992).

The district court found that appellant was entitled to be treated as a minor participant in the criminal conduct but refused to accord her status as a minimal

actor. This finding is not clearly erroneous.

The record shows that the evidence was more than sufficient to support the verdict and there was no error in refusing to give appellant's requested jury instruction dealing with suspicion, guesswork and speculation.

There being no merit in the contentions raised, we affirm the judgment of the district court.

Affirmed.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 29 1993
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-6156

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REGINA CHAMBERS,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: FAY, KRAVITCH and BIRCH, Circuit Judges.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED an the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en bank, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Fay
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

Section 841. Prohibited acts A

(a) **Unlawful acts.** Except as authorized by this title, it shall be unlawful for any person to knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) **Penalties.** Except as otherwise provided in section 405 [21 USCS Section 845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of

imprisonment or not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special

parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for

an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4

years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in

addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine or not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsection (a) and (b) of section 404 [21 USCS Section 844(a), (b)].

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this title, phencyclidine (as defined in section 310(c)(2) [21 USCS Section 830(c)(2)]) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable

under paragraph (1) of this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana,or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) involving a quantity of marihuana exceeding 1,000 pounds, such person shall be

sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this title, title III, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

(c) **Special parole term**. A special parole term imposed under this section or section 405 [21 USCS Section 845] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period

of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405 [21 USCS Section 845] shall be in addition to, and not in lieu of, any other parole provided for by law.

(d) **Piperidine offenses and penalty.** Any person who knowingly or intentionally --

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this title, or

(2) possesses any piperidine knowingly, or having reasonable cause to believe, that the

piperidine will be used to manufacture phencyclidine except as authorized by this title,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

2D1.1

Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses): Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1),(b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior conditions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(the offense level

specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less thanlevel 26, increase to level 26.